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No. _____

In The

Supreme Court of the United States

October Term, 1986

RICHARD REETZ,

Petitioner,

-vs-

KINSMAN MARINE TRANSIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

- AND APPENDIX -

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER, IN AN ACTION UNDER GENERAL ADMIRALTY AND MARITIME LAW, WHERE PREJUDGMENT INTEREST IS A PERMISSIBLE COMPONENT OF RECOVERY, THERE IS A UNIFORM PROCEDURE FOR CONSIDERATION OF INTEREST, COMPELLED BY FEDERAL LAW, WHICH REQUIRED THE STATE APPELLATE COURT TO REVERSE THE TRIAL JUDGE'S DECISION TO AWARD PREJUDGMENT INTEREST IN POST-TRIAL PROCEEDINGS WHERE: THE PARTIES AGREED TO DEFER DECISION ON INTEREST RATHER THAN SUBMIT THE ISSUE TO THE FACT-FINDER AT TRIAL; WHERE STATE LAW REQUIRES THAT ALL JUDGMENTS BE AUGMENTED BY PREJUDGMENT INTEREST IN POST-TRIAL PROCEEDINGS; AND WHERE THE TRIAL JUDGE AWARDED PREJUDGMENT INTEREST IN THE EXERCISE OF HIS DISCRETION.

II.

WHETHER, AS THE STATE COURT HELD, PETITIONER BECAME DISENTITLED TO PREJUDGMENT INTEREST IN HIS ACTION UNDER GENERAL ADMIRALTY AND MARITIME LAW, BECAUSE THE SHIPOWNER WAS ALSO HELD LIABLE UNDER THE JONES ACT, 46 USC § 688.

PARTIES TO PROCEEDINGS

Petitioner RICHARD REETZ was a Great Lakes seaman who, in September of 1974, sustained crippling injuries while employed aboard the MERLE McCURDY, a cargo-carrying vessel. He was the Plaintiff in an action filed that year in Wayne County Circuit Court, a trial court of general jurisdiction located in Detroit, Michigan. Petitioner's Complaint alleged a cause of action under the Jones Act, 46 USC § 688, and a cause of action for unseaworthiness under general admiralty and maritime law. Nine years later, in October of 1983, a unanimous jury returned a special verdict finding for Petitioner under both theories and assessing his damages at $1,026,750.00.[1] In post-trial proceedings, the trial court allowed Petitioner prejudgment interest on his recovery under general admiralty and maritime law, as compensation for the lost use of the sums due throughout the nine years of litigation delay. He now seeks review of the decisions by the Michigan appellate courts which ultimately reversed the allowance of prejudgment interest.

Respondent KINSMAN MARINE TRANSIT COMPANY is the owner and operator of the MERLE McCURDY and was the party held liable for Petitioner's injuries. As the defendant in the state tort action, Respondent was the beneficiary of its successful argument to the Michigan appellate courts that Petitioner could not be awarded interest on his recovery.

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[1] As the jury found Petitioner guilty of 6% comparative negligence, his net recovery was reduced to $965,145.00.

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OPINIONS BELOW

On April 12, 1984, the trial judge, the Hon. John R. Kirwan, issued a six-page Memorandum Opinion explaining his allowance of prejudgment interest (B-1 - B-5). That opinion is unpublished, as is the *per curiam* opinion of the Michigan Court of Appeals issued March 31, 1986, which reversed the allowance of prejudgment interest (D-1 - D-5). When Petitioner filed his timely Motion for Rehearing, the Court of Appeals denied relief in an order certified June 16, 1986 (E-1). The Michigan Supreme Court's denial of discretionary review is reported as *Reetz* v *Kinsman Marine Transit Co*, 426 Mich 882; 381 NW2d 716 (1986) (F-1).

SUPREME COURT JURISDICTION

Petitioner seeks review of the opinion of the Michigan Court of Appeals and the order of the Supreme Court of Michigan issued December 16, 1986. He invokes the jurisdiction conferred on this Court by 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

Article III, § 2, ¶ 1 of the Constitution of the United States provides:

> "The jurisdictional Power shall extend to all cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States . . . [and] to all cases of admiralty and maritime Jurisdiction . . ."

Article VI, ¶ 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

28 USC § 1873 (the Great Lakes statute) provides:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in dif-

ferent states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it."

28 USC § 1961 (as amended by the Federal Courts Improvement Act of 1982) provides in pertinent part:

"(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

* * *

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section."

46 USC § 688 (The Jones Act), provides in pertinent part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or ex-

tending the common-law right or remedy in cases of personal injury to railway employees shall apply . . ."

MCLA 600.6013; MSA 27A.600.6013 provides in pertinent part:

"(1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section.

(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment shall be calculated from the date of filing the complaint to June 1, 1980 at the rate of 6% per year and on and after June 1, 1980, to the date of satisfaction of the judgment at the rate of 12% per year compounded annually."

STATEMENT OF THE CASE

This petition for writ of certiorari arises from rulings of the Michigan appellate courts which held, in substance, that federal principles of general admiralty and maritime law preclude a trial judge from allowing prejudgment interest in post-trial proceedings where a jury has found against the shipowner on a Jones Act claim as well as on the action for unseaworthiness. That ruling stems from a personal injury action filed by Petitioner Richard Reetz, a Great Lakes seaman, against Respondent Kinsman Marine Transit Co., the owner and operator of the cargo vessel on which Plaintiff sustained crippling injuries in September of 1974.

At that time, Respondent's vessel, the Merle McCurdy, was on Lake Superior in transit from Ashtabula, Ohio to

Duluth, Minnesota. Petitioner was engaged in a procedure to open the hatch when the line he was holding released, hurtling Plaintiff through an open hatch to the steel floor 40 feet below, where his ankle literally exploded upon impact.

Two months later, Petitioner filed suit in Wayne County Circuit Court, a state court of general jurisdiction located in Detroit, Michigan. His Complaint alleged two separate causes of action: negligence by the shipowner giving rise to a statutory recovery under the Jones Act, 46 USC § 688, and unseaworthiness of the Merle McCurdy giving rise to a recovery under the judge-made principles of general admiralty and maritime law.[1]

At the first trial, held in October of 1977, the jury returned a general verdict[2] for Petitioner in the amount of $800,000. Although this damage award was less than that ultimately awarded, Respondent declined to satisfy this lesser award and successfully appealed. *Reetz* v *Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (19__).[3] In this fashion, the case was delayed for about

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[1] General admiralty and maritime law is essentially the common law of the sea. As judge-made law, it is not subject to the legislative constraints imposed on parallel statutory remedies. *Moragne* v *States Marine Lines*, 398 US 375, 392 (1970); *Sea-Land Services, Inc* v *Gaudet*, 414 US 573, 586-588 (1982).

[2] Unlike the second trial, where a special verdict form was used, the jury at the first trial did not specify whether the verdict was based on the Jones Act count, the count alleging unseaworthiness, or both. As a matter of Michigan procedure, the inability to identify the theory upon which it was based requires that the verdict be construed in the fashion most favorable to the appellant's appellate position. *St. John* v *Nichols*, 331 Mich 148, 158; 49 NW2d 113 (1951); *VanderLaan* v *Miedema*, 385 Mich 226; 188 NW2d 564 (1971); *People* v *Davenport*, 39 Mich App 252; 197 NW2d 521 (1972).

[3] On the first appeal, the Michigan Court of Appeals concluded that the Jones Act, viewed in light of the pre-1982 version of 28 USC

(*concluded on page 6*)

nine years from the date suit was filed until the commencement of the retrial in late September, 1983.

Michigan law divides interest into two components: interest for the delay between the date of injury and commencement of suit ("pre-suit" interest), and interest for the period between commencement of suit and entry of judgment ("prejudgment" interest). *Vannoy* v *City of Warren*, 26 Mich App 283, 288-289; 182 NW2d 65 (1970). Pre-suit interest is an element of damages which may be considered by the fact-finder in the damage-assessment process at trial. Michigan Standard Jury Instructions (SJI) 2d 53.04. In contrast, the fact-finder is barred from considering prejudgment interest in assessing damages, as the trial judge is required by statute [MCLA 600.6013; MSA 27A.600.6013] to augment the verdict in post-trial proceedings by adding the statutory measure of prejudgment interest to the damage award. *Ballog* v *Knight Newspapers, Inc*, 381 Mich 527; 164 NW2d 19 (1969); *Jaffe* v *Harris*, 419 Mich 942; 355 NW2d 617 (1984).

Consistent with this procedure, the parties agreed at trial not to submit to the jury the question of interest for the period between the filing of suit and trial, "That will still be decided" (Tr. 10/5/83, pp. 24-25) (A-1 – A-2). The instructions did not allow the jury to award interest as a component of the recovery (Tr. 10/5/83, pp. 24-25) (A-1 – A-2).

(*continued from page 5*)

§ 1961 then existing, precluded an award of prejudgment interest on a Jones Act recovery. Since the general verdict at the first trial allowed for the possibility that the jury found for Petitioner only on the Jones Act count, the Court of Appeals upheld the decision of the first trial judge which did not allow prejudgment interest. On the second appeal which is the subject of this petition, the Court of Appeals correctly held that its earlier opinion did not govern because of the post-1982 special verdict on retrial which expressly found for Petitioner on both claims.

The jury was instructed on the distinct elements of each of the two causes of action alleged. At the conclusion of trial, the jury rendered a special verdict, expressly finding that Respondent's vessel was unseaworthy, and that Respondent was negligent. Judgment was duly entered for Petitioner and against Respondent.

As this result was reached in an error-free trial, Respondent satisfied the principal amount of the judgment. This left unresolved the issue of prejudgment interest for the period between November of 1974, when suit was filed, and April 26, 1984, when judgment was entered.

Eventually, Petitioner filed a Motion for Entry of Judgment, seeking to have the trial judge, the Hon. John R. Kirwan, award prejudgment interest. Thereafter, on April 12, 1984, Judge Kirwan issued a Memorandum Opinion allowing prejudgment interest (B-1–B-5). In that opinion, the Court concluded that although prejudgment interest was unavailable on the Jones Act count, the allowance of prejudgment interest on the general admiralty and maritime law claims was within the discretion of the trial court (Memorandum Opinion, pp. 4-5) (B-3–B-5).

Exercising his discretion, the Court reviewed the policies favoring allowance of prejudgment interest as compensation for the lost use of the sums due during the pendency of the litigation (Memorandum Opinion, p. 5) (B-4–B-5). The Court allowed prejudgment interest largely on this basis, noting:

> "Plaintiff suffered his injury on September 23, 1974 and brought his action against defendant on November 22, 1974. The recent jury verdict in his behalf was rendered on October 5, 1983. If this

> matter had been resolved within a short period of time after the incident had occurred, plaintiff would have had for many years the use of the money to which he was entitled. [The intervening events do] not alter the fact that defendant has had and plaintiff has not had the use of the verdict amount for those several years that this matter has been pending." (Memorandum Opinion, p. 5) (B-4–B-5).

Respondent then appealed to the Michigan Court of Appeals. In its *per curiam* opinion of March 31, 1986, that Court (the Hon. Vincent J. Brennan, the Hon. Donald E. Holbrook, Jr., and the Hon. C. W. Simon) reversed the allowance of prejudgment interest (Opinion, pp. 3-4) (D-3–D-5). In the Court's view, Respondent was allowed to avoid this measure of relief because it was not only held liable under general admiralty and maritime law, but was also guilty of negligence actionable under the Jones Act (Opinion, pp. 3-4) (D-3–D-5). The Court of Appeals also found that federal law compelled that prejudgment interest could only be awarded by the jury at the time of trial, not by the court in post-trial proceedings (Opinion, p. 4) (D-4–D-5).

Petitioner then filed a timely Motion for Rehearing, addressing the rationale that prejudgment interest could not be awarded after trial. Petitioner pointed out that Respondent had essentially agreed to that procedure at trial. Moreover, claimed Petitioner, there is no single compulsory federal method of assessing prejudgment interest that would preempt post-trial assessment of interest, either as a matter of judicial discretion or in conformance with general Michigan procedure.

The Motion for Rehearing also discussed the alternative rationale offered by the Court of Appeals. Petitioner contended that it was irrational to allow Respondent to

parlay its own liability under the Jones Act into immunity from the more generous measure of recovery allowed Petitioner on his independent action under general admiralty and maritime law. He pointed out that there could be no danger of a double recovery since the jury (whose decision was available to the parties because of 28 USC § 1873) was not allowed to award prejudgment interest as an element of damages.

These arguments were unavailing, and the Michigan Court of Appeals denied the Motion for Rehearing by order issued June 16, 1986 (E-1). Petitioner then sought leave to appeal to the Supreme Court of Michigan, which denied leave by order issued December 16, 1986 (F-1). Petitioner now seeks review in this Court.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER, IN A JURY-TRIED ACTION FOR UNSEAWORTHINESS UNDER GENERAL ADMIRALTY AND MARITIME LAW, THE SEAMAN'S CLAIM FOR PREJUDGMENT INTEREST MUST BE CONSIDERED BY THE JURY AS AN ELEMENT OF DAMAGES AT TRIAL, OR WHETHER IT MUST BE CONSIDERED BY THE TRIAL JUDGE IN POST-TRIAL PROCEEDINGS, OR WHETHER THERE IS NO SINGLE FEDERALLY COMPELLED PROCEDURE TO PREEMPT A TRIAL JUDGE'S ALLOWANCE OF PREJUDGMENT INTEREST IN POST-TRIAL PROCEEDINGS IN ACCORD WITH THE PROCEDURE AGREED UPON BY THE PARTIES, EMPLOYED BY THE TRIAL JUDGE IN THE EXERCISE OF HIS DISCRETION, AND REQUIRED UNDER THE GENERAL LAW OF THE FORUM.

General admiralty and maritime law governs commerce over waterways which are a natural resource and

play a prominent role in the naval defense of our country. Article III, § 2 of the Constitution identifies admiralty law as essentially federal in nature.

The humane and liberal character of such proceedings has given rise to the principle that, in cases of doubt, a remedy is to be given rather than withheld. The applicable substantive doctrine to be invoked in resolving such "gray area" questions finds its genesis in *The Sea Gull*, 21 Fed Cas 909, 910 (CC Md, 1865). This doctrine, reaffirmed in *Moragne* v *States Marine Lines*, 398 US 375, 387 (1970), was stated in *Sea-Land Services, Inc* v *Gaudet*, 414 US 573, 583 (1974) and *American Export Lines, Inc* v *Alvez*, 446 US 274, 281-282 (1980) as follows:

> "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

This maxim was denominated, "a settled canon of maritime jurisprudence", in *American Export Lines, Inc.*

In specific application, this canon permits recovery of prejudgment interest in an action under general admiralty and maritime law. In *The Scotland*, 118 US 507, 518-519 (1885) this Court recognized that the general admiralty tradition allowed interest on damages, within the discretion "of the tribunal which has to pass upon the subject, whether it be a court or a jury." Two years later, in *The Maggie J. Smith*, 123 US 349, 356 (1887), the Court reaffirmed that the allowance of interest on the recovery from the date of suit to payment was a matter within the discretion of the trial judge.

The earlier cases, like *The Scotland* and *The Maggie J. Smith*, often dealt with commercial disputes, such as lawsuits between the owners of ships which had collided or suits between a shipowner and the owner of the

cargo. It has now been realized that the same underlying policies of admiralty allow a liberal recovery for seamen who have been historically viewed as at the mercy of the sea and shipowner and as essential to the naval facet of our national defense. *Waldron* v *Moore-McCormack Lines*, 386 US 724, 728 (1967); *Reed* v *Steamship Yaka*, 373 US 410, 413 (1963).

In fact, it has been noted that, with admiralty's traditional solicitude for seamen and the ordinary inability of an injured person to weather the economic catastrophe caused by his injury, there are even more compelling reasons for allowing prejudgment interest to a personal injury suitor than to a commercial claimant. *Rivera* v *Rederi A/B Nordstjernan*, 456 F2d 970, 976 (1st Cir. 1966).

Suffice it to note for present purposes that, as a matter of substantive law, a trial judge may, in his discretion, allow prejudgment interest to an injured personal injury claimant who prevails under general admiralty and maritime law.[4] A few of the more recent cases so holding are *Rivera, supra*; *Petition of the City of New York*, 332 F2d 1006 (2nd Cir. 1964); *Matter of Bankers Trust Co*, 658 F2d 103 (3rd Cir. 1981); *Curry* v *Fluor Drilling Services, Inc*, 715 F2d 893, 896 (5th Cir. 1983); and *Wright* v *Ocean Drilling & Exploration Co*, 444 So2d 129, 136 (La App, 1983).

In non-admiralty cases, the pre-1982 version of 28 USC § 1961 was sometimes thought to bar prejudgment interest in federal causes of action tried in a state court.

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[4] Not only *may* prejudgment interest be awarded, it ordinarily *should* be permitted. Prejudgment interest must be allowed unless exceptional circumstances dictate otherwise. *The Wright*, 109 F2d 699, 702 (2nd Cir. 1940); *First Bank of Chicago* v *Material Service Corp*, 597 F2d 1110, 1121 (7th Cir. 1979); *Matter of Bankers Trust Co*, 658 F2d 103, 108 (3rd Cir. 1981); *Samincorp* v *S S Rivadelung*, 277 F Supp 943, 945 (Del, 1967); *Sea-Land Services, Inc* v *Eagle Terminal Tankers, Inc*, 443 F Supp 532, 534 (WD Wash, 1977).

The amendments to that statute accomplished by the Federal Courts Improvement Act of 1982 now make it clear that the federal interest statute does not apply to actions tried in a state court, 28 USC § 1961(4) ("This section shall not be construed to affect the interest on any judgment of any court not specified in this section"). And, it is now clear that the allowance of prejudgment interest in admiralty cases, as compensation for the lost use of the sums in question, is not barred by 28 USC § 1961, but is consistent with the purpose of the statute. *Frederick* v *Mobil Oil Corp*, 765 F2d 442 (5th Cir. 1985); *Columbia Brick Works, Inc* v *Royal Ins Co*, 768 F2d 1066 (9th Cir. 1985); *Western Pacific Fisheries, Inc* v *SS President Grant*, 730 F2d 1280, 1288-1289 (9th Cir. 1984); *Todd Shipyards Corp* v *Turbine Services, Inc*, 763 F2d 745, 753 (5th Cir. 1985).

Under Michigan law, prejudgment interest must be added to the principal damage award to accomplish fair compensation. *Banish* v *City of Hamtramck*, 9 Mich App 381, 400; 157 NW2d 445 (1968); *Coan* v *Township of Brownstown*, 126 Mich 626, 631; 86 NW2d 1129 (1901); *Lane* v *Ruhl*, 103 Mich 38, 45; 164 NW2d 19 (1880). The trial judge is required to augment the damage award after trial by the interest set forth by statute. MCLA 600.6013; MSA 27A.600.6013; *Ballog* v *Knight Newspapers, Inc*, 381 Mich 527; 355 NW2d 617 (1969); *Jaffe* v *Harris*, 419 Mich 942 (1984).

In the case at bar, the sums due Petitioner were witheld for more than nine years after suit was filed. During that period, the shipowner and its insurer had the use of the sums due Petitioner. Substantive general admiralty and maritime law, 28 USC § 1961, and Michigan law all favor the allowance of prejudgment interest as compensation for the lost use of the principal

sums due.[5] Despite this, Petitioner was denied interest, under the view that general admiralty law forecloses the post-trial augmentation procedure agreed to by these parties and implemented by the trial judge in accord with Michigan procedure. Certiorari should be granted to review the conclusion that general admiralty and maritime law compel such a result which provides a shipowner with a windfall in excess of $750,000[6] at the expense of the seaman victimized by its misconduct.

A. The View That There Is A Single Compulsory Procedure For Consideration Of Prejudgment Interest, Which Precludes A Trial Judge From Allowing Interest In Post-Trial Proceedings, Is At Odds With The Cases Around The Country Which Endorse A Variety Of Permissible Procedures.

The trial court's allowance of prejudgment interest was uncontestably proper under Michigan procedure, MCLA 600.6013; MSA 27A.600.6013; *Ballog, supra.* In overturning the application of local procedure, the Michigan appellate courts necessarily found that the post-trial consideration of prejudgment interest was preempted by a contrary body of federal law. This construction of federal law should be reviewed.

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[5] This Court itself recently recognized the salutary role of prejudgment interest in providing full compensation for the lost use of money from when the claim accrues until judgment is rendered. *West Virginia* v *United States*, 479 US ___, ___; 107 S Ct ___; 93 L Ed 2d 639, 646, fn. 2 (1987).

[6] The trial judge adopted the interest rates specified in MCLA 600.6013; MSA 27A.600.6013. In substance, the statute requires simple interest from the date of suit (November, 1974) to June of 1980 at 6% per year (5½ years at 6% = 33%), and compound interest of 12% from June 1, 1980 until payment in early 1984. *Gage* v *Ford Motor Co*, 423 Mich 250; 377 NW2d 709 (1985). At a conservative estimate of 80% interest on the $965,000 principal, the amount at stake in this case is well in excess of $750,000.

In the general sense, a state court forum applying general admiralty and maritime law must apply the substantive admiralty law as developed by the federal courts. *Gulf Offshore Co* v *Mobil Oil Corp*, 453 US 473, 478 (1959). But this does not mean that all state laws and procedures which may in some way touch upon matters of admiralty must be ignored. To the contrary, the federal-state relationship in this field is one of mutual accomodation. Only those provisions of local law which substantially conflict with the purposes of federal law are preempted. *Kossick* v *United Fruit Co*, 365 US 732, 739 (1973).

Askew v *American Waterways Operators*, 411 US 325 (1973), discussed the scope of federal admiralty law which is preclusive of state law. There, it was explained that state law must yield only to the extent that federal interests are thwarted by the possible lack of uniformity:

> "[s]tate law must yield to the needs of a federal maritime law when this Court finds inroads on a harmonious system . . . State rules . . . have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." *Askew*, 411 US at 338.

Thus, the litmus test is whether federal interests demand uniformity. Only when this is so must state law fall. Stated in a different fashion:

> ". . . a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile 'to the characteristic features of the maritime law or inconsistent with federal legislation.'" *Askew*, 411 US at 338.

The conclusion that there exists here a "uniform" "harmonious" federal procedure for the consideration of

prejudgment interest misperceives the status of the law around the country. To be sure, some courts have held that, unless prejudgment interest is considered as an element of damages at the trial itself, the claimant is procedurally barred from obtaining that recovery from the trial judge in post-trial proceedings. The cases adopting this procedure include *Newburgh Land & Dock Co* v *Texas Co*, 227 F2d 732 (2nd Cir. 1959); *Robinson* v *Pocahontas, Inc*, 477 F2d 1048 (1st Cir. 1973); *Havis* v *Petroleum Helicopters, Inc*, 664 F2d 54, 55 (5th Cir. 1981); and *Peterson* v *C&O R Co*, __ F2d __ (6th Cir. 1986).

However, this is hardly the only procedure which has been allowed. For example, *Rivera* v *Rederi A/B Nordstjernan*, 456 F2d 970 (1st Cir. 1972), like this case, involved an action for unseaworthiness under general admiralty and maritime law. As here, the action was tried to a jury, and afterwards the trial judge allowed prejudgment interest from the date of the Complaint. On appeal, the First Circuit affirmed the trial court's allowance of prejudgment interest (*Rivera*, 456 F2d at 976).

In Petition of Oskar Tiedeman & Co, 236 F Supp 895 (DC Del, 1964), reversed on other grounds, 367 F2d 498 (3rd Cir. 1966), the issue of prejudgment interest was first raised after trial. As here, the defendant asserted that post-trial allowance of prejudgment interest was procedurally improper. The Court rejected this claim, concluding that the liberal admiralty practice allowed for the post-trial assessment of prejudgment interest (236 F2d at 901). The Court further noted that the routine admiralty practice in at least one other district was to treat prejudgment interest questions as solely post-trial in nature (236 F2d at 901, fn. 7).

Benoit v *Fireman's Fund Ins Co*, 361 So2d 1332 (La App, 1978), as here, involved a jury trial of a seaman's joined Jones Act and general admiralty claims. As in this

case, after the jury returned a verdict for the plaintiff, the trial judge added prejudgment interest, a result upheld by the Louisiana Court of Appeals.

M&O Marine, Inc v *Marquette Co*, 730 F2d 133, 136 (3rd Cir. 1984) is also on point. In that case, the plaintiff's admiralty law claim was tried to a jury. After the jury assessed damages, the trial judge allowed prejudgment interest on the jury award. On appeal, the Third Circuit affirmed, noting:

> "As to the calculation and award of prejudgment interest in admiralty such is a matter left to the sound discretion of the district court . . . [W]e see no abuse of discretion in the trial court's reliance on a state court rule based on delay damages in the setting of prejudgment interest in an admiralty case."

Recent cases have endorsed without comment a trial judge's allowance of prejudgment interest in post-trial proceedings. See, *e.g.*, *Columbia Brick Works, Inc* v *Royal Ins Co*, 768 F2d 1066 (9th Cir. 1985); *Frederick* v *Mobil Oil Corp*, 765 F2d 442 (5th Cir. 1985).

The cited cases all implicitly or explicitly recognize that there is no single compulsory procedure that would preclude the post-trial allowance of prejudgment interest by the trial court. The Michigan appellate ruling in this case is fundamentally inconsistent with *Rivera; Petition of Oskar Tiedeman & Co; Benoit; M&O Marine, Inc; Frederick* and *Columbia Brick Works, Inc.*

Apart from the erroneous belief that federal law compels a single procedure for consideration of prejudgment interest, the Michigan courts were in error in believing that state procedure is, in the words of *Askew*, "hostile to the characteristic features of the maritime law or inconsistent with federal legislation." The pertinent

characteristic feature of maritime law is the substantive doctrine that a trial judge may allow prejudgment interest. Whatever may be said of the theoretical merits of the two alternative procedures, the Michigan approach is hardly "hostile" to the substantive allowance of prejudgment interest. Even if there was some difference between the Michigan procedure and a different "uniform" and "harmonious" procedure elsewhere, the application of Michigan procedure would not be foreclosed.

The issue presented involves important considerations of federal admiralty law juxtaposed with a spirit of federal-state relations which preempts only such state procedures as are antithetical to the essential features of maritime law. The ruling below deprives a member of the protected class of seamen of any compensation for almost a decade of delay. All in the name of "uniformity", Petitioner has received no consideration of prejudgment interest which is uniformly available under the substantive provisions of general admiralty and maritime law, 28 USC § 1961, and Michigan law.

Certiorari should be granted. On review, the Court should conclude that federal maritime law does not preclude assessment of prejudgment interest in post-trial proceedings where, as here, the parties agree to that procedure at trial, courts around the country have allowed such a procedure, the trial court adopts that procedure as a matter of judicial discretion, and that is the procedure required by the law of the forum.

B. If A Single Procedure Is To Be Required In The Interest Of National Uniformity, The Court Should Grant Certiorari To Resolve The Conflict Between Cases Holding That Prejudgment Interest Must Be Considered By The Fact-Finder As An Element Of Damages At The Time Of Trial And Cases Allowing The Trial Judge To Consider Prejudgment Interest In Post-Trial Proceedings.

The position of Petitioner is that there is no single required procedure. If, however, one concludes otherwise, the fundamental question is *which* procedure is to be embraced. The Court should grant certiorari to resolve the conflict between the cases embracing the "fact-finder at trial" approach and those adopting the "post-trial judicial" approach.

The *existence* of the conflict is clear. The decision of the trial judge, adopting the "post-trial judicial" procedure, finds support in such cases as *Rivera; Petition of Oskar Tiedeman & Co; Benoit; M&O Marine, Inc; Frederick* and *Columbia Brick Works, Inc.* The Court of Appeals' view, that the fact-finder at trial is better suited to consider prejudgment interest, finds support in a competing line of authority exemplified by such cases as *Newburgh Land & Dock Co; Robinson; Havis* and *Peterson.*

The need for this Court's intervention should also be clear. By hypothesis, national uniformity is required, yet the lower courts have been unable to decide which of the competing procedures best comports with the overriding principles of federal maritime law.

The chaotic state of the law is anything but uniform, and produces results which are inconsistent with the controlling admiralty principles. Litigants in some jurisdictions, such as Petitioner herein, are procedurally

barred from receiving any consideration of the pre-judgment interest to which they are substantively entitled. In other jurisdictions, seamen receive this measure of relief because of the allowance of post-trial judicial consideration. A state of the law whereby the result turns on the fortuity of the forum utilized is the very opposite of the "uniformity" which is said to foreclose a Michigan trial court from following Michigan procedure.

The injustice which can arise from the split of authority is demonstrated by this very case. The trial judge did not submit pre-trial interest to the jury because he adopted the opposite methodology. The appellate courts then disallowed the post-trial judicial method because of the view that the question should have been submitted to the jury. The net result of this procedural disagreement is that Plaintiff has been denied the benefit of *either* procedure,[7] even though his entitlement to at least have this element of recovery considered is beyond serious dispute. This result is fundamentally incompatible with the substantive principles of admiralty law which the Michigan courts claimed to effectuate.

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[7] The Court of Appeals' suggestion that the post-trial judicial method is improper because "the jury considers the delay in making an award" is transparently fallacious. Where the post-trial judicial method is used, the instructions make it clear that the jury *cannot* award the interest which will later be considered by the court. So it is with the instructions in this case. Where the instructions do not allow the jury to consider delay in making the award, "It would be absurd to . . . speculat[e] that the jury did not do their duty and follow the instructions of the Court," *Graham* v *United States*, 231 US 474, 480 (1913).

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING THAT A SEAMAN, OTHERWISE ENTITLED TO PREJUDGMENT INTEREST ON HIS RECOVERY UNDER GENERAL ADMIRALTY AND MARITIME LAW, FORFEITS ANY SUCH RECOVERY BY ALSO PREVAILING ON A JURY-TRIED CAUSE OF ACTION UNDER THE JONES ACT.

The alternative ground cited by the Court of Appeals hinged on the fact that the jury also returned a verdict for Plaintiff in his claim under the Jones Act. Quoting *Barton* v *Zapata Offshore Co*, 397 F Supp 778, 780 (ED La, 1975), the Court of Appeals stated (Opinion, pp. 3-4) (D-3–D-5):

> "There might be merit to this analysis if either the jury had denied recovery under the Jones Act and found unseaworthiness, or if there were some element of admiralty damage not allowable under the Jones Act. But here the verdict found the employer liable under the Jones Act as well as the general maritime law; the elements and amount of damage claimed were identical. If the court may not award prejudgment interest on the Jones Act claim, there is no separate 'pure' admiralty item on which to allow interest. Furthermore, the reason given by the court in *Moore-McCormack Lines, Inc* v *Richardson, supra*, for denying a right to prejudgment interest in jury-tried Jones Act cases — that the jury considers the delay in making an award — would apply with equal force to a jury-tried unseaworthiness claim. In sum, the plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails."

If the jury had found for Plaintiff only on the unseaworthiness claim (or if Plaintiff had not exercised his unquestioned right to join a Jones Act claim), it was conceded by Respondent (Tr. 11/4/83, p. 31) and found by the Court of Appeals (Opinion, p. 3) (D-3–D-4) that prejudgment interest might be available. In that event, the jury would find only that the vessel was unseaworthy. Here, the jury made that very finding and, in addition, found Defendant culpable of negligence. The notion that Respondent is insulated from liability for prejudgment interest on the count under general admiralty and maritime law, simply because it was also found liable under the Jones Act, should be reviewed by this Court.

Conventional wisdom has it that prejudgment interest may not be recovered under the Jones Act. *Marine Towing Co* v *Brennan*, 85 F2d 478 (5th Cir. 1936); *Louisville & Arkansas Ry Co* v *Pratt*, 142 F2d 847 (5th Cir. 1944); *Shemman* v *American Steamship Co*, 89 Mich App 656, 677; __ NW2d __ (1979). Yet even if it is granted that the statutory Jones Act recovery does not allow for prejudgment interest, it scarcely follows that this prohibition eclipses the ordinary availability of prejudgment interest under general admiralty and maritime law.

This very point was squarely addressed in *American Export Lines, Inc* v *Alvez, supra:*

> "[W]e [do not] read the Jones Act as sweeping aside general maritime law remedies . . . [T]he Jones Act lacks such preclusive effect even with respect to true seamen; thus, we have held that federal maritime law permits the dependents of seamen killed within territorial seas to recover for violation of a duty of unseaworthiness that entails a stricter standard of care than the Jones Act" (446 US at 283).

The same result is required by *Sea-Land Services, Inc* v *Gaudet, supra*. In *Gaudet*, the Court held that the general solicitude for seamen expressed in general admiralty and maritime law required a broader remedy under that branch of the law than might be available under a parallel statutory cause of action. As *Gaudet* makes clear, statutory restrictions on the scope of an available recovery do not control the scope of recovery under judge-made general admiralty and maritime law. As to the latter, the historic public policies favor liberality of recovery. To effectuate these policies, a full recovery is available for unseaworthiness, even though only a more limited recovery would be allowed under a related statutory claim.

The decision below is inconsistent with the mainstream of authority around the country. Other courts have recognized that while the Jones Act does not permit prejudgment interest, the contrary rule prevails for recoveries based on general admiralty and maritime law. *National Airlines, Inc* v *Stiles*, 268 F2d 400, 406 (5th Cir. 1959); *Sandoval* v *Mitsui Sempaku K. K. Tokyo*, 460 F2d 1163, 1171 (5th Cir. 1972); *Moore-McCormack Lines, Inc* v *Richardson*, 295 F2d 583 (2nd Cir. 1961); *Melancon* v *IMC Drilling Mud*, 282 So2d 532, 541 (La App, 1973); *Petition of Oskar Tiedeman & Co*, 236 F Supp 895, 901-902 (DC Del, 1964), reversed on other grounds, 367 F2d 498 (3rd Cir. 1966); *Doucet* v *Wheless Drilling Co*, 467 F2d 336, 340 (5th Cir. 1972); *Portier* v *Texaco, Inc*, 426 So2d 623, 630 (La App, 1982); *Hirstius* v *Louisiana Materials Co, Inc*, 413 So2d 611, 615 (La App, 1982).

The Michigan Court of Appeals has suggested that it is somehow unfair for a plaintiff to obtain a jury trial for his unseaworthiness claim solely because it is joined with a Jones Act claim, and then obtain the prejudgment interest that a judge could award in a bench trial. To be

sure, for many maritime cases, the right to a jury trial is based solely on the Plaintiff's allegation of a cause of action under the Jones Act. In that context, as in *Barton*, it is true that a plaintiff would not otherwise be entitled to trial by jury on his action under general admiralty and maritime law.

While this premise is generally correct, it is simply inapplicable to this case by virtue of 28 USC § 1873, the Great Lakes statute, which provides:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it."

In implying that Plaintiff's action under general admiralty and maritime law would not have been jury-triable by itself, the Court of Appeals erred in overlooking the Great Lakes Statute and the cases which have recognized that while no right to jury trial on such a claim would otherwise exist, trial by jury is ordained under this statute where the maritime tort occurs upon a Great Lakes vessel such as the SS Merle McCurdy. See *Michalic* v *Cleveland Tankers*, 364 US 325, 331 fn. 4 (1960); *Texas Menhaden Co* v *Palermo*, 329 F2d 579 (2nd Cir. 1964); *Troupe* v *Chicago, Duluth & Georgian Bay Transit Co*, 234 F2d 253 (2nd Cir. 1956).

Indeed, since the Great Lakes Statute allows *either* party to obtain trial by jury, the Court of Appeals' opinion is particularly unjust. If it is the *fact* of trial by jury which is decisive, that opinion allows the Defendant, by invoking

its right to a jury trial under 28 USC § 1873, to deprive the Plaintiff of the interest he would recover in a bench trial. Conversely, if it is *who* requested trial by jury that is decisive, the effect is that the recovery of prejudgment interest turns on which of two parties, equally entitled to trial by jury, invokes the option conferred by Congress under 28 USC § 1873. In either event, to disentitle Plaintiff to prejudgment interest because of his exercise of the right to trial by jury is inherently at odds with the congressional purpose behind the enactment of 28 USC § 1873.

In the final analysis, the decisions below construed the Jones Act and Great Lakes Statute to detract from the remedies otherwise available to a seaman under general admiralty and maritime law. Such a construction is at odds with the congressional purpose of expanding the remedies available to injured seamen, a purpose correctly discerned by this Court in *American Export Lines, Inc* and *Gaudet*.

In sum, the decisions of the Michigan appellate courts conflict with those of this Court and the federal courts. The decisions which Petitioner seeks to have reviewed undermine significant principles of admiralty law which are constitutionally committed to the protection of this Court. The amounts at stake for Petitioner and comparably situated injured seamen, who are denied redress for years of delay, are substantial. The questions presented involve the delicate interplay between federal supremacy concerns and the prerogative of state courts

to utilize their own procedures. This case, and the issues it presents, warrant the consideration of this Court.

Respectfully submitted,

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Dated: March 12, 1986

APPENDICES

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APPENDIX A

SELECTED TRIAL TRANSCRIPT

(State of Michigan — Circuit Court — County of Wayne)

(RICHARD L. REETZ, Plaintiff, v KINSMAN MARINE TRANSIT CO., Defendant — CA No. 74-038-183 NO; Hon. John R. Kirwan)

EXCERPT OF JURY INSTRUCTIONS RE: DAMAGES

PROCEEDINGS OF OCTOBER 5, 1983

* * *

(24) * * * Now, this does not mean that the law recognizes only one cause of an injury or damage consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage, and in such a case, each may be a cause for the purpose of determining liability in a case such as this one.

Now, members of the jury, if you decide that the plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates him for each of the elements of damage which you decide has resulted from the negligence of the defendant, or the unseaworthiness of the vessel, taking into account the nature and extent of the injuries.

You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:

A. Physical pain and suffering;
B. Mental anguish;
C. Fright and so you can [*sic*, shock];
D. Denial of social and recreational pleasures and enjoyments;
E. Embarrassment, humiliation and mortification;
(25) F. Loss of earnings and — capacity.

You should also determine the amount of damages which you decide plaintiff is reasonably certain to sustain in the future:

A. Physical pain and suffering;
B. Mental anguish;
C. Fright and shock;
D. Denial of social and recreational pleasures and enjoyments;
E. Embarrassment, humiliation or mortification; and
F. Loss of earning capacity.

If any element of damage is of a continuing nature you shall decide how long it may continue. If an element of damage is permanent in nature, then you shall decide how long the plaintiff is likely to live.

Which, if any, of these elements of damage has been proved, is for you to decide based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate plaintiff for his damages, and not to punish the defendant.

* * *

EXCERPT OF DISCUSSION AFTER JURY INSTRUCTIONS

PROCEEDINGS OF OCTOBER 5, 1983

* * *

(35) * * * SHERIFF FOX: I want the attorneys to stipulate that the exhibits can be given to the jury without us calling you first.

MR. JAQUES: Fine.

MR. MILLER: Fine.

THE COURT: I think we should get all the exhibits in order and put them in a little packet or manila folder and if they do ask for them then we can give it to them.

MR. O'BRYAN: I think they're all up there.

THE COURT: Okay. If you want to look at them, you may.

MR. JAQUES: We waive interest —

THE COURT: I think you waive any interest that might be entitled.

MR. JAQUES: We waive interest from the date of occurrence to the date of filing, and any charge relative thereto. And defendant, as I understand it, waives the charge, Standard Jury Instruction with regard to reduction as to future damages, reduction of those damages to present value. Is that correct?

MR. DUNN: That's correct.

(36) THE COURT: Okay. Anything else?

MR. DUNN: That is not to indicate that we acquiesced to any other statement on the law what interest is in this case. That still will be decided.

THE COURT: Yes. Okay.

(Recess)

SPECIAL VERDICT OF JURY

PROCEEDINGS OF OCTOBER 5, 1983

(36 (*cont'd*) Jury enters 1:30 p.m.)

THE CLERK: Will the foreman rise, please?

THE COURT: First, before we start, I think the record should reflect that counsel, Mr. O'Bryan, is here with his client. Apparently Mr. Jaques will not be here, is that right?

MR. O'BRYAN: That's correct.

THE COURT: All right. Mr. Dunn and Mr. Miller both representing the defendant are here.

Are you already to receive the verdict at this time?

MR. MILLER: Yes.

MR. DUNN: Yes.

THE CLERK: Have you agreed upon a verdict?

JUROR NO. 4: Yes, ma'am.

Number one, was the defendant —

THE COURT: You can read it out loud.

JUROR NO. 4: Was the defendant shipowner negligent?

Yes.

(37) Was the vessel unseaworthy?

Yes.

If the answer to number one is yes, was the negligence of the shipowner contributing cause to plaintiff's injury?

Yes.

If the answer to number two is yes, was unseaworthiness of the vessel a contributing cause to plaintiff's injury?

Yes.

What is the total amount of damages to the plaintiff, if any, in regards to his injuries?

One million twenty-six thousand and seven hundred fifty.

Was the plaintiff negligent?

Yes.

Did the plaintiff's negligence contribute to his injuries?

Yes.

If the plaintiff was negligent, then what percentage of his own negligence caused this injury?

Six percent.

What was plaintiff's damages less reduction of the percentage of his contributory negligence?

$965,145.00.

(38) THE COURT: 965 and what?

JUROR NO. 4: $965,145.00.

THE COURT: $965,145.00, all right.

Anything further?

MR. O'BRYAN: Just to check the arithmetic.

THE COURT: Okay. Go ahead and check it.

My calculation is that it is correct. So the verdict is $965,145.00, is that right?

JUROR NO. 4: That's right.

Anything further, Mr. Dunn, Mr. Miller?

MR. MILLER: Nothing.

MR. DUNN: Nothing.

* * *

APPENDIX B

MEMORANDUM OPINION

(State of Michigan — Circuit Court — County of Wayne)

(Dated April 12, 1984)

(RICHARD L. REETZ, Plaintiff, - vs - KINSMAN MARINE TRANSIT COMPANY, Defendant — CA No. 74-038-183 NO; HON. JOHN R. KIRWAN P-16013)

On October 5, 1983, a jury returned a verdict in favor of the plaintiff for injuries he suffered while a seaman working aboard one of defendant's vessels. The jury found the defendant liable on plaintiff's complaint alleging in Count I violations of duties under the Jones Act and Count II unseaworthiness of the vessel. The issue presented to the Court is whether or not plaintiff is entitled to pre-judgment interest.

It is the claim of the defendant that the plaintiff is not entitled to pre-judgment interest because such interest is not allowable under the Jones Act. In support of its claim defendant cites several cases, including the per curiam opinion of *Reetz* v *Kinsman Marine Transit Company*, Court Appeals Docket No. 78-1856, a decision rendered in this case when first heard by the Court of Appeals. The court said:

> "Inasmuch as the matter is to be retried, we address plaintiff's cross appeal, wherein it is claimed that interest should have been awarded from the date of filing the complaint pursuant to MCL 600.6013; MSA 27A.6013. This issue has been decided by this court:
>
> > "The trial court was correct in denying pre-judgment interest. The Jones Act incor-

> porates the Federal Employer's Liability Act. *Garrett* v *Moore-McCormack Co, Inc*, 317 US 239, 244-245; 63 S Ct 246; 87 L Ed 2d 239 (1942). The allowance of interest on such judgments is a matter of federal substantive law. *Louisiana & A R Co*, 142 F2d 847 (CA 5, 1944). *See also Hanley* v *Erie R Co*, 81 NYS2d 100 (1948)." *Sheman* v *American Steamship Co, supra.*

The plaintiff claims that this case is now distinguishable from when first tried because the jury in the original trial returned a general verdict and did not specifically find as they did in the second trial liability on the unseaworthiness count. Plaintiff claims that pre-judgment interest is allowable when an unseaworthiness claim has been established.

There can be no question that the Michigan Court of Appeals has ruled what pre-judgment interest is not allowable to plaintiff when a jury returns a general verdict for the plaintiff on a Jones Act claim and a claim alleging unseaworthiness of the vessel. The rationale for such a decision is sound because when only a general verdict of liability exists in a two-count complaint alleging both unseaworthiness of the vessel and violations of duties under the Jones Act, a trial court has no way of determining whether the jury found defendant liable under the Jones Act alone or whether the jury also found defendant liable on the claim of unseaworthiness. As pre-judgment interest is not allowable in a Jones Act case and as the jury may in the first trial of this matter have found liability only on the basis of the Jones Act, pre-judgment interest was not appropriate under such circumstances.

The posture of this case, however, is now different than when first tried. Defendant in the second trial was

found liable not only under the Jones Act, but also under a count specifically alleging unseaworthiness of the vessel. As plaintiff could now request a withdrawal of the count alleging violations of duties under the Jones Act and proceed only under the count alleging unseaworthiness, it logically follows that if plaintiff is entitled to pre-judgment interest under an unseaworthiness claim, pre-judgment interest would be available to plaintiff in this case.

The case appears to be one of first impression in Michigan. Other jurisdictions, however, have addressed the issue of pre-judgment interest with varying results. While there does exist a Federal post-judgment interest statute, there is no comparable statute allowing pre-judgment interest. However, Federal courts have held that the statute mandating post-judgment interest merely removes the imposition of such interest from the discretion of the trial court, and does not affect the discretion of the trial court in imposing pre-judgment interest in appropriate cases. In *Chagois* v *Lykes Bros. Steamship Co*, 432 F2d 388, the court held:

> "In an action to enforce federal substantive rights and governed by federal procedural rules, there is no room for the application of state law. Thus we adhere to the established federal rule that in admiralty actions the matter of pre-judgment interest rests within the sound discretion of the trial court. *Canova* v *Travelers Insurance Co*, 5 Cir. 1969, 406 F.2d 410; *Haynes* v *Rederi A/S Aladdin*, 5 Cir. 1966, 362 F.2d 345." *See also Howell* v *Marmpegaso Compania Naviera*, 578 Fed Rep 86.

In *Benoit* v *Fireman's Fund Insurance Co*, 361 So. 2d 1332 (La. App. 1978), the court said:

> "The final matter in this case deals with the award of interest on the judgment. The trial

> judge cast defendants for legal interest from the date of judicial demand. In the concluding remarks contained in their original and supplemental briefs, defendants maintain that interest should run from the date of the entry of the judgment. In maritime law, the time at which interest begins to run rests within the discretion of the court. *Canova* v. *Travelers Insurance Company*, 406 F.2d 410 (C.A. 5th Cir. 1969), writ denied 396 U.S. 832, 90 S. Ct. 88, 24 L. Ed. 2d 84 (1969). We find no abuse of discretion."

While this Court is not unmindful that these holdings are contrary to the holding in *Barton* v *Zapata Offshore Co*, 379 F. supp 778, it is this Court's view that *Chagois, supra, Canova, supra,* and *Benoit, supra,* sets forth the more reasoned approach. Pre-judgment interest should, therefore, rest within the sound discretion of the trial court when plaintiff prevails on a count of unseaworthiness.

In exercising its discretion in this matter the Court is of the view that pre-judgment interest should be available to plaintiff because those policy considerations that support the granting of such interest exist in this case. If granting pre-judgment interest rests on the theory that it is indemnity for the delay in paying for the loss, then certainly pre-judgment interest is appropriate in this case. Plaintiff suffered his injury on September 23, 1974 and brought his action against defendant on November 22, 1974. The recent jury verdict in his behalf was rendered on October 5, 1983. If this matter had been resolved within a short period of time after the incident had occurred, plaintiff would have had for many years the use of the money to which he was entitled. While it is true as plaintiff argues that part of this long delay was caused by counsel for plaintiff whose remarks during

the first trial caused a mistrial, still this does not alter the fact that defendant has had and plaintiff has not the use of the verdict amount for those several years that this matter has been pending.

While this decision may appear to be contrary to the holding in *Reetz* v *Kinsman Marine Transit Co, supra,* it is this Court's view that it is not. Certainly this Court would rule that pre-judgment interest is not allowable in this case if convinced the case was in the same posture as it was when first before the Court of Appeals. The Court believes, however, that because in the second trial the jury specifically found in behalf of the plaintiff on the unseaworthiness count, a different result is mandated.

For all of the above reasons this Court is of the view that plaintiff should be entitled to pre-judgment interest as provided in MCL 600.6013. A judgment consistent with this Memorandum Opinion may be presented by plaintiff to the Court for entry.

/s/ JOHN R. KIRWAN
CIRCUIT JUDGE

DATED: APR. 12, 1984

(*Certification Omitted*)

APPENDIX C

ORDER OF JUDGMENT

(State of Michigan — Circuit Court — County of Wayne)

(Dated April 26, 1984)

(RICHARD L. REETZ, Plaintiff, -vs- KINSMAN MARINE TRANSIT CO., Defendant — CA 74-038-183 NO)

At a session of the Wayne County Circuit Court, held on April 26, 1984.

PRESENT: HENRY J. SZYMANSKI,
WAYNE COUNTY CIRCUIT COURT JUDGE

The above styled cause having been tried to a jury with a verdict in favor of Plaintiff and against Defendant in both counts alleged, negligence under the Jones Act and unseaworthiness under the General Admiralty and Maritime Law, in the amount of ONE MILLION TWENTY SIX THOUSAND SEVEN HUNDRED FIFTY ($1,026,750.00) DOLLARS with comparative fault of Plaintiff to the extent of six percent (6%), with the award reduced thereby in the total of NINE HUNDRED SIXTY FIVE THOUSAND ONE HUNDRED FORTY FIVE ($965,145.00) DOLLARS in addition to taxable costs and interest from the date of filing the Complaint in accordance with Title 27A of the Judicature Act, Michigan Statutes Annotated § 27A.6013; and the interest hereof is based solely on the jury verdict of unseaworthiness in accordance with General Admiralty and Maritime Law.

/s/ HENRY J. SZYMANSKI
WAYNE COUNTY CIRCUIT COURT JUDGE

/s/ Judge Kirwan

Approved as to form: _____

APPENDIX D

OPINION

(State of Michigan — Court of Appeals)

(Issued March 31, 1986)

(RICHARD L. REETZ, Plaintiff-Appellee, -v- KINSMAN MARINE TRANSIT COMPANY, Defendant-Appellant — No. 78339)

BEFORE: V. J. Brennan, P.J.,
and D. E. Holbrook, Jr. and C. W. Simon*, JJ.

PER CURIAM

Defendant Kinsman Marine Transit Company appeals by right from an opinion and order of judgment that confirmed a jury award of $965,145 plus taxable costs and a judicial award of $616,000 in prejudgment interest in favor of plaintiff Richard L. Reetz. The sole issue appealed is that of the prejudgment interest award.

The material facts in this case are not in dispute. Plaintiff was injured on September 23, 1974, while assigned to defendant's vessel, the M-V Merle McCurdy. The case was originally tried on counts of negligence under the Jones Act and unseaworthiness. The jury returned an $800,000 verdict of general liability in favor of plaintiff. The circuit court denied plaintiff's claim for prejudgment interest.

Both parties appeal to this Court with defendant arguing it was deprived of a fair trial as a result of prejudicial remarks made by plaintiff's counsel, and with plaintiff again asserting his claim for prejudgment

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* Circuit judge, sitting on the Court of Appeals by assignment.

interest. This Court, in an unpublished per curiam opinion, reversed the judgment. The Court also affirmed the lower court's denial of prejudgment interest on the basis that federal substantive law does not allow prejudgment interest under the Jones Act.

Plaintiff appealed to the Supreme Court, and in lieu of granting leave to appeal, the Court affirmed this Court and remanded for a new trial without discussing this Court's denial of the plaintiff's prejudgment interest cross-appeal. *See Reetz* v *Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (1982).

After the second trial, the jury once again returned a verdict in favor of plaintiff. In contrast to the first trial, the jury rendered a special verdict finding defendant liable on both of plaintiff's counts. However, the jury was not requested to and did not apportion the award of damages between the counts. A judgment, including interest on the verdict from the date of judicial demand, was entered. The trial court reasoned that this Court's opinion on appeal of the first judgment did not control the issue on retrial and, that although prejudgment interest was unavailable on the Jones Act count, the allowance of prejudgment interest on the general admiralty and maritime law claim was within the discretion of the trial court.

Defendant first argues that the law of the case doctrine should have precluded the trial court in the second trial from awarding prejudgment interest. We disagree. The law of the case requires a court to adhere to legal rulings made in an original appeal where the pertinent underlying facts have not changed. *CAF Investment* v *Saginaw Twp*, 410 Mich 428, 455; 302 NW2d 164 (1981). Nonetheless, it is clear that an appellate opinion on a former appeal is not the law of the case in a new trial as to any new facts which renders the former opinion

inapplicable. *Mitchell* v *R E Olds Farms Co*, 261 Mich 615, 617; 247 NW 89 (1933).

In finding plaintiff was entitled to prejudgment interest on his award following the circuit court retrial, the court rejected the argument that the interest was barred by the law of the case. The court reasoned that the posture of the second case was different because the jury specifically found defendant liable on both counts. We agree with the trial court and find no inherent inconsistency between the initial decision by this Court and the trial court's decision now being appealed.

Prejudgment interest is unavailable to one whose recovery is based on the Jones Act. *Louisiana & A R Co* v *Pratt*, 142 F2d 847 (1944). The Michigan cases that have addressed the issue of recovery of prejudgment interest in seamen's claims have looked to federal substantive law and not Michigan law to deny seamen prejudgment interest under MCL 600.6013; 27A.6013. However, the cases have done so on the basis of the jury having arrived at a general verdict of liability under both the Jones Act and the common law unseaworthiness claim. *See e.g., Shemmen* v *American Steamship Co*, 89 Mich App 656, 676-677; 280 NW2d 852 (1979), *lv den* 407 Mich 875 (1979). It is the specific finding of separate liability under the Jones Act and general admiralty law which distinguishes this case from other cases and raises a novel question for this Court's review.

An action in admiralty, such as plaintiff's claim of the unseaworthiness of defendant's vessel, should be tried under the applicable rules of admiralty, even when brought in state court. *Sullivan* v *Pittsburgh Steamship Co*, 230 Mich 414, 419; 203 NW 126 (1925); *Wyatt* v *Penrod Drilling Co*, 735 F2d 951 (1984). Thus, federal maritime law governs the issue of prejudgment interest.

Our review of the applicable federal maritime law leads us to the conclusion that the award of prejudgment interest in this case was erroneous. In *Barton* v *Zapata Offshore Co*, 397 F Supp 778 (ED, La 1975), the plaintiff recovered a single award under both the Jones Act and general maritime law. The plaintiff argued that an unseaworthiness claim remains a claim in admiralty even when joined with a Jones Act claim and sent to a jury, and thus it followed that an award of prejudgment interest would be proper. The Federal District Court explained its denial of plaintiff's request for prejudgment interest as follows:

> "There might be merit to this analysis if either the jury had denied recovery under the Jones Act and found unseaworthiness, or if there were some element of admiralty damage not allowable under the Jones Act. But here the verdict found the employer liable under the Jones Act as well as the general maritime law; the elements and amounts of damage claimed were identical. If the court may not award prejudgment interest on the Jones Act claim, there is no separate 'pure' admiralty item on which to allow interest. Furthermore, the reason given by the court in *Moore-McCormick Lines, Inc* v *Richardson, supra,* for denying a right to prejudgment interest in jury-tried Jones Act cases — that the jury considers the delay in making an award — would apply with equal force to a jury-tried unseaworthiness claim. In sum, the plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails." 397 F Supp at 780.

See also Wyatt, supra, 735 F2d 956.

We also note that in *Peterson* v *Chesapeake&O R Co*, 582 F Supp 1581 (WD, Mich (1984)), the Court held that where an admiralty cause of action is tried solely to a jury, as it was in this case, prejudgment interest may only be granted by the jury. 582 F Supp 1583. Under either of these analyses, the trial court erred in awarding plaintiff prejudgment interest. We, therefore, VACATE that portion of the judgment.

/s/ Vincent J. Brennan
/s/ Donald E. Holbrook, Jr.
/s/ Charles W. Simon, Jr.

APPENDIX E

ORDER DENYING MOTION FOR REHEARING

(State of Michigan — Court of Appeals)

(Issued June 16, 1986)

(RICHARD REETZ, Plaintiff-Appellee, v KINSMAN MARINE TRANSIT COMPANY, Defendant-Appellant — No. 78339; L.C. No. 74 038 183 NO)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 11th day of June in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable: Vincent J. Brennan, Presiding Judge; Donald E. Holbrook, Jr.; Charles W. Simon, Judges.

In this cause a motion for rehearing is filed by plaintiff-appellee, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

(*Certification Omitted*)

APPENDIX F

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Issued December 16, 1986)

(RICHARD L. REETZ, Plaintiff-Appellant, v KINSMAN MARINE TRANSIT COMPANY, Defendant-Appellee — SC: 79009; COA: 78339; LC: 74-03-183-NO)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 16th day of December in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable:
G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(*Certification Omitted*)

(8)

No. 86-1483

In The

Supreme Court of the United States

October Term, 1986

RICHARD REETZ,
Petitioner,

vs.

KINSMAN MARINE TRANSIT COMPANY,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD CERTIORARI BE GRANTED IN A CASE WHICH MEETS NONE OF THE CRITERIA OF 28 U.S.C.A. 1257(3) AND NONE OF THE CONSIDERATIONS OF RULE 17?

II.

WHERE THE PRACTICE FOR PREJUDGMENT INTEREST IN SEAMEN'S CASES IS SETTLED IN ALL FEDERAL COURTS AND ALL STATE COURTS OF LAST RESORT, SHOULD THIS COURT DISTURB IT?

III.

SHOULD PREJUDGMENT INTEREST BE AWARDED ON FUTURE DAMAGES NOT REDUCED TO PRESENT VALUE?

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No. 86-1483

In The

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ARGUMENT

I.

THE SUPREME COURT LACKS JURISDICTION.

Petitioner cites two articles of the Constitution, three federal statutes and one state statute, in support of his jurisdictional claim, but the "validity" of none of these is "drawn in question" by anyone. Hence, there is no jurisdiction under 28 U.S.C. 1257(3).

There is no conflict between decisions of federal courts or state courts of the last resort nor is there an important question of federal law raised. This case is important only to the parties. Hence, none of the considerations of Rule 17 are met.

II.

THE PRACTICE FOR PREJUDGMENT INTEREST IN SEAMEN'S CASES IS SETTLED IN ALL FEDERAL COURTS AND ALL STATE COURTS OF LAST RESORT.

The practice for prejudgment interest in seamen's cases is settled. Prejudgment interest may not be awarded in a Jones Act suit at law. Where a general maritime claim is tried to a jury, the grant or denial of prejudgment interest must be submitted to the jury. *Petersen* v. *Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 740 (6th Cir. 1986). Prejudgment interest in seamen's cases tried to the court is subject to the usual admiralty rule of discretion. *Doucet* v. *Wheless Drilling Co.*, 467 F.2d 336, 340 (5th Cir. 1972).

Petitioner claims the practice is unsettled and cites six cases on pages 15 and 16 of his Petition. The first of these, *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970 (1st Cir. 1972), allowed prejudgment interest because of the obstinacy of the defendant, a result not incongruous with the settled practice. The second, *Petition of Oskar Tiedeman & Co.*, 236 F Supp 895 (D. Del. 1964), was an admiralty case tried to a commissioner, not a jury. The court's discussion at 901 supports the settled practice. The third, *Benoit* v. *Fireman's Fund Ins. Co.*, 361 So.2d 1332 (La. App. 1978), is not a decision of a state court of last resort as mentioned in Rule 17. More importantly, *Benoit* has been impliedly overruled by *Morris* v. *Schlumberger*, 436 So.2d 1178, 1183 (La. App. 1983). The fourth, *M&O Marine, Inc.* v. *Marquette Co.*, 730 F.2d 133, 136 (3rd Cir. 1984), was an indemnity trial for fixed damages sought by an employer, not a seaman's case. The fifth, *Columbia Brick Works, Inc.* v. *Royal Ins. Co.*, 768 F.2d 1066 (9th Cir. 1985), was a cargo case involving fixed damages, not a seaman's case. The sixth,

Frederick v. *Mobil Oil Corp.*, 765 F.2d 442 (5th Cir. 1985), was an action brought under the Outer Continental Shelf Lands Act, which expressly incorporates state law [43 U.S.C. 1333(a)(2)(A)] and applies "federal law, supplemented by state law of the adjacent State . . . to these artificial islands as though they were federal enclaves in an upland State". *Rodrigue* v. *Aetna Casualty Co.*, 395 U.S. 352, 355, 89 S.Ct. 1835, 1837 (1969). Thus, there is no conflict in the settled practice.

Since neither petitioner nor respondent can cite any decision of a federal court or a state court of last resort in conflict with the settled practice, the considerations of Rule 17 are not met.

III.

PREJUDGMENT INTEREST SHOULD NOT BE AWARDED ON FUTURE DAMAGES NOT REDUCED TO PRESENT VALUE.

Petitioner claimed permanent injury. Petitioner's lost wages to date of trial were around $100,000.00. His pain and suffering to date of trial was an additional, unspecified amount. But the net verdict well exceeded $900,000.00. Thus, the great bulk of petitioner's award was for future, not yet incurred loss and suffering. Yet, petitioner seeks 12 percent compound interest on the total award. This Court's special solicitude for seamen, however apt in modern times, has never countenanced greed of this magnitude.

The settled practice is that the trier of fact, be it judge or jury, makes the entire award, with or without prejudgment interest as discretion dictates. Petitioner now seeks to scramble the settled practice by mechanical application of a local statute in post trial proceedings under the guise of judicial discretion. The Michigan

Court of Appeals would have no part of this. The Michigan Supreme Court denied leave because not worthy of review. This Court should do the same.

The purpose of prejudgment interest is compensation for present losses, not punishment of defendants or windfalls for claimants. It is an abuse of discretion to award prejudgment interest on future damages. *Valley Line Co.* v. *Ryan*, 771 F.2d 366, 377 (8th Cir. 1985); *Martin* v. *Walk, Haydel & Associates*, 794 F.2d 209, 212 (5th Cir. 1986).

CONCLUSION

Michigan courts have consistently interpreted Michigan's prejudgment interest statute in conformity with prevailing federal case law in order to insure the uniform application of the Jones Act to all seamen irrespective of the forum in which the litigation is instituted. The interpretation of the Michigan statute is peculiarly within the purview of the Michigan courts and does not present a question for review by this Court. Respondent would therefore request this Court to deny the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan.

Respectfully submitted,

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Dated: March 31, 1987

No. 86-1483

In The

Supreme Court of the United States

October Term, 1986

RICHARD REETZ,

Petitioner,

-vs-

KINSMAN MARINE TRANSIT COMPANY,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF AND SUGGESTION OF REMAND FOR RECONSIDERATION

- IN LIGHT OF -

BURLINGTON NORTHERN RAILROAD COMPANY v *WOODS*, 480 US __; 108 SCt __; 94 LEd 2d 1 (1987)

[*No. 85-1088, decided 2/24/87*]

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No. 86-1483

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***BURLINGTON NORTHERN RAILROAD COMPANY* v *WOODS*,**
480 US __; 108 SCt __; 94 LEd 2d 1 (1987)
[*No. 85-1088, decided 2/24/87*]

BACKGROUND

This is a maritime personal injury action. Petitioner, a seaman, seeks redress for injuries sustained on Respondent's Great Lakes vessel. His complaint alleges a statutory cause of action under the Jones Act, 46 USC § 688, and an action under general admiralty and maritime law for the unseaworthiness of the ship. Suit was filed, and the case pursued, through the Michigan state court system.

Under Michigan procedure, the jury is not allowed to consider in its damage award interest for the delay

between commencement of suit and rendition of judgment. Instead, interest is allowed by statute [MCLA 600. 6013; MSA 27A.6013], and the court is required to ministerially augment the recovery by assessment of prejudgment interest in post-trial proceedings. *Ballog* v *Knight Newspapers, Inc*, 381 Mich 527; 164 NW2d 19 (1969) (*see* Petition for Writ of Certiorari, pp. 6, 12-13).

Consistent with this procedure, the parties agreed that the question of prejudgment interest would be decided by the court after the trial. The jury returned its verdict for Petitioner, and the trial judge eventually allowed Petitioner interest on the damage award in accord with MCLA 600.6013; MSA 27A.6013. In reaching this result, the trial judge relied on the settled principle that, under substantive admiralty law, the trial judge may, as a matter of discretion, allow interest as a component of recovery (Appendix to Petition, pp. B-5, B-6).

The Michigan Court of Appeals reversed the allowance of interest. That Court found that there was an established federal procedure which precluded a trial judge from allowing interest in post-trial proceedings (Appendix to Petition, p. D-5). It also concluded that this perceived federal procedure governed to the exclusion of the contrary Michigan post-trial procedure which would ordinarily apply to a case tried in a state court forum (Appendix to Petition, p. D-3). Consequently, the Court held that conflict of law principles barred the forum (a Michigan state court) from applying its own interest procedure to a lawsuit arising under the substantive law of another sovereign (federal law).

THE PENDING PETITION FOR A WRIT OF CERTIORARI

Petitioner has filed his Petition for a Writ of Certiorari. In that Petition, he has contended that the interests of

federal substantive law do not require a state forum court to refrain from following its own interest procedure (Petition for Writ of Certiorari, pp. 13-17).

THE IMPACT OF *BURLINGTON NORTHERN RAILROAD COMPANY* v *WOODS*, 480 US __; 108 SCt __; 94 LEd 2d 1 (1987)

Petitioner has filed this Supplemental Brief to bring to the Court's attention its recent decision in *Burlington Northern Railroad Company* v *Woods*, 480 US __; 108 SCt __; 94 LEd 2d 1 (1987) [No. 85-1088, decided 2/24/87] ("*Burlington*"). Petitioner suggests that *Burlington* is on point for the conflict of law question of whether interest issues are to be resolved by the procedure of the forum or the procedure of the jurisdiction whose substantive law applies.

Burlington was a diversity action arising out of a motorcycle accident governed by Alabama law. Under the principles of *Erie Railroad Company* v *Tompkins*, 304 US 64; 58 SCt 817; 82 LEd 1188 (1938), the federal forum was obliged to apply Alabama substantive law. Contrary to the law of the federal forum, Alabama law provided a 10% interest penalty in favor of an appellee who successfully defended a money judgment on appeal. In that context, the *Burlington* court was called upon to decide whether the interest procedure to be applied was that of the jurisdiction whose substantive law governed, or the forum jurisdiction's own procedure.

To resolve the question, this Court looked to the competing considerations. The test applied was that a forum's procedural rules "which incidentally affect litigants' substantive rights" do not impermissibly infringe on those substantive rights "if reasonably necessary to maintain the integrity of [the forum's] system of rules." *Burlington*, 94 LEd 2d at 7. Under this test, the Court

held in *Burlington* that the federal forum's use of its own procedure was required as that procedure did not infringe upon any "substantive right" existing under Alabama law.

APPLICATION OF *BURLINGTON* TO THIS CASE

The analogy between this case and *Burlington* is compelling. Each involves the forum's ability to apply the procedure it has adopted to compensate personal injury litigants for the delay in obtaining their recovery. This component was denominated procedural in *Burlington,* just as prejudgment interest augmentation is procedural under the Michigan law involved in this case, *Ballog, supra*. In each case, the additional recovery is the method used for dealing with the delay encountered in the forum court system.

Reduced to its essence, the holding in *Burlington* recognizes that an interest augmentation of this type is not "substantive". It further recognizes that the forum's interest in regulating the delay in its own court system outweighs any interest of the jurisdiction whose substantive law is the source of the lawsuit. Applying the *Burlington* principles to this case, here the Michigan forum's procedure for dealing with the delay encountered in its court system by allowing prejudgment interest is not barred by the interests of the federal sovereign in the application of substantive admiralty law.

The comparison is all the more compelling when consideration is given to the comparable preclusion standards involved in this case and *Burlington*. There, the federal forum was allowed to apply its own rules "if reasonably necessary to maintain the integrity of that system of rules" even though this might "incidentally affect litigants' substantive rights". For the admiralty

context of this case, *Askew* v *American Waterways Operators*, 411 US 325, 338 (1973) permits the application of a state forum court's procedure unless "hostile to the characteristic features of the maritime law."

SUGGESTION OF REMAND

In short, *Burlington* provides substantial guidance on the issue of whether there is a federal method of assessing prejudgment interest which precludes a state forum court from applying its own procedure. Petitioner suggests that this Court remand the instant case for reconsideration in light of *Burlington*. Otherwise, for the reasons discussed in the Petition and this Supplemental Brief, certiorari should be granted.

Respectfully submitted,

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